



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 23, 1996

Mr. Richard J. Ybarra
Open Records Coordinator
Office of the Attorney General
General Counsel Division, MC-018
P.O. Box 12548
Austin, Texas 78711-2548

OR96-0776

Dear Mr. Ybarra:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38759.

The Office of the Attorney General of Texas (the "OAG") received a request for "all documentation [it] has regarding [its] investigation of the Statesman National Life Insurance Company [(the "company")] located in Houston, Texas." You have submitted examples of the documents that you believe are excepted from required public disclosure which you have marked as exhibits 2-7. You assert that exhibits 2, 3, 4, and 7 are excepted from disclosure as work product pursuant to section 552.103 of the Government Code. You raise other exceptions in regard to these exhibits, including the common-law right to privacy and the informer's privilege in conjunction with section 552.101 of the Government Code. You also assert that exhibit 5 is excepted from disclosure based on section 552.111 of the Government Code and that exhibit 6 contains information about the company's financial performance which it may consider proprietary. See Gov't Code § 552.305.

With regard to your section 552.103 claim,¹ you inform us that the OAG has concluded its litigation concerning the company. You urge that the protection of section

¹Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to

552.103 for an attorney's work product should continue beyond the duration of the litigation, citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991). The issue of the duration of the protection of section 552.103 of the Government Code for work product information is the subject of pending litigation between the Harris County District Attorney and the OAG, now on appeal to the Texas Supreme Court. *See Holmes v. Morales*, 906 S.W.2d 570 (Tex. App.--Austin 1995, writ granted). Pursuant to section 552.306 of the Government Code, the attorney general is required to issue a written opinion within sixty working days from the date the attorney general receives a request for an open records decision. As the Supreme Court's ruling will be controlling in this matter, we must conclude that you may withhold the requested information until the Court issues a decision. Once the Court rules, should the requestor still desire copies of the information for which you claim section 552.103, you must disseminate the information in accordance with the Court's decision or request another ruling from this office.

We will consider your claim for protection for exhibits 5 and 6. You assert that section 552.111 of the Government Code applies to exhibit 5, a letter from an assistant attorney general to representatives of the Texas Department of Insurance. Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See Open Records Decision No. 615 (1993)*. This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.*

We have reviewed exhibit 5 and observe that it contains purely factual information. We therefore conclude that section 552.111 is inapplicable.

(Footnote continued)

which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. *Open Records Decision No. 588 (1991)*.

You raise the company's proprietary interest with regard to exhibit 6, two letters to OAG representatives from a company representative. Section 552.110 excepts from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

We have reviewed exhibit 6. Based on the information provided this office, we believe that release of the letters is quite likely to cause substantial harm to the company's competitive position. Accordingly, we conclude that the OAG must withhold the letters from disclosure based on section 552.110 of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 38759

Enclosures: Submitted documents

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(w/o enclosures)